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C O N F I D E N T I A L SECTION 01 OF 03 PRETORIA 002481

SIPDIS

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TAGS: PGOV PINR KJUS SF

SUBJECT: SOUTH AFRICA: NEW PROSECUTOR APPOINTMENT
CRITICIZED AS HIGHLY POLITICAL

REF: PRETORIA 02442

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Classified By: Political Counselor Walter N.S. Pflaumer for reasons 1.4
(b) and (d).

Summary

¶1. (C) President Jacob Zuma has appointed Menzi Simelane as the country's new Director of Public Prosecutions (DPP). The selection raised criticism both because of Omelane's involvement in political infighting at the National Prosecuting Authority (NPA) and because of Zuma's continued push to appoint allies to key state positions, particularly those in the security apparatus. Respected legal minds and opposition parties have branded Simelane a "liar" and called him "neither fit nor proper" for the NPA's top post. That said, Zuma clearly had reasons for selecting the new DPP, which likely included his desire to make sure he remains protected from the kind of corruption and moral turpitude charges which former President Mbeki tried to use to end his political career, as well as a wish to surround himself with key allies from his days as a member of the KwaZulu-Natal Province Executive Council. While such a narrowly political appointment to such an important position in the criminal justice system may serve Zuma's own interests, we believe Simelane is a poor choice for a beleaguered agency. We are also concerned for what this appointment says about how Zuma intends to use the machinery of state in terms of respecting the Constitution and the rule of law. End Summary.

Who Is Menzi Simelane?

¶2. (C) President Jacob Zuma in late November endorsed Menzi Simelane as DPP. The appointment ended a two-year period of intense political infighting over the independence of the NPA, the nation's top legal organization. Simelane joined the Johannesburg Bar in 1997. In 2005, he was appointed Director General of the Department of Justice and Constitutional Development, a position he held until this year. His name became well known in South Africa during the deliberations of the Ginwala Commission, appointed by then-President Mbeki in September 2007 to investigate the conduct of then-DPP Vusi Pikoli. Mbeki had suspended Pikoli in September 2007, citing a breakdown in the relationship between Pikoli and Justice Minister Brigitte Mabandla (Comment: most observers believe the real reason for the breakdown was Pikoli's determination to investigate senior

officials close to Mbeki for corruption. End comment). Frene Ginwala, a respected former speaker of the National Assembly, was appointed later that month by Mbeki to head an inquiry into Pikoli's suspension and establish whether Pikoli was fit to hold office.

¶3. (C) During the inquiry, Ginwala criticized Simelane's conduct and testimony, and raised questions about his integrity. The final report of the Ginwala Inquiry criticized Simelane for becoming too involved in the NPA's business in ways which affected the independence of the NPA. In addition, the report cited incidences in 2006 where Simelane asked senior members of the NPA to spy on Pikoli, in an effort to discredit Pikoli as head of the agency. The Ginwala Commission accused Simelane of compromising the independence of the NPA. Following Ginwala's report, the Public Service Commission (PSC) was asked to investigate complaints about Simelane. The PSC's investigations were never made public, but are believed to have left it to the discretion of Justice Minister Jeff Radebe to make a final decision on whether to act against Simelane. Radebe has since announced that Simelane would not face a disciplinary hearing. Pikoli ultimately was absolved by the Ginwala Commission of any wrongdoing. Former President Kgalema Motlanthe nonetheless fired him in December 2008. Pikoli later sued the government over his dismissal, a case which was settled out of court with a payment to Pikoli of R7.5 million (over US\$1 million).

Toward a Politicized NPA?

¶4. (C) Observers have challenged the selection both because

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of Simelane's actions against Pikoli as revealed by the Ginwala Inquiry, and because his testimony to the Inquiry revealed ignorance (perhaps wilful) of the Constitutionally mandated role of the DPP as being independent of the executive. When challenged on specific provisions of the Constitution relevant to the DPP's role and the independence of the NPA, he seemed remarkably ignorant of both their content and the interpretations made of them by the Constitutional Court.

¶5. (C) Most disturbingly, Simelane's statements and actions have suggested that he would run the NPA on very politicized lines. University of Cape Town political scientist Pierre de Vos commented on his weblog that Simelane "believes that the National Prosecuting Authority is not independent and should take instructions from the Minister and the President (rather than the prosecutors themselves) on how to deal with politically sensitive cases." He states, "With Simelane at the helm, no one will ever again be prosecuted if the President or the Minister does not give the go-ahead." De Vos further writes, "The irresistible inference must therefore be drawn that Simelane was appointed as DPP because he has "shown himself to be contemptuous of the Constitution and the Constitutional Court, and willing to lie and deceive to please his political masters."

¶6. (C) Justice Minister Jeff Radebe, however, strongly defended the President's choice of Simelane. On November 30, he held a press conference in which he argued that Simelane had been treated unfairly by the media, and critics from within the legal profession. Radebe said that the attack on Simelane during the Ginwala Commission was without foundation, and criticized the fact that Simelane had not been given the opportunity to defend himself against Ginwala's allegations (Comment: Radebe apparently missed the irony that it was his own decision to block any inquiry into Simelane's actions which "deprived" Simelane of the "opportunity" to justify his behavior. End comment). Radebe argued that Simelane's actions in the Pikoli affair had been

consistent with the law, and concluded that he was satisfied that Simelane is a "fit and proper" person to provide leadership to the NPA. He said that he was "confident that as a cabinet member responsible for the administration of justice, I will continue to have a healthy professional relationship with the NPA."

Reasons for Zuma's Choice, Beyond the Obvious

17. (C) Given how President Zuma's own political career was nearly ended by corruption allegations and a trial for rape, it is perhaps not surprising that he would be concerned to protect himself from the risk of further legal troubles. It is also reportedly the case that Zuma values personal loyalty particularly highly. He has filled many posts in his administration with allies from his days in KwaZulu-Natal politics, especially in positions of strategic importance such as those dealing with law enforcement issues. Zuma's Cabinet includes several such KwaZulu-Natal cronies, including Ebrahim Patel, Musa Nhlanhla Nene, Malusi Gigaba, Jeff Radebe, Nathi Mthethwa, Roy Padayachie, Siyabonga Cwele, Sbusiso Ndebele, and Noluthando Mayende-Sibiya. Zuma also named two other members from his KwaZulu-Natal club to key Qnamed two other members from his KwaZulu-Natal club to key positions, appointing Mo Shaik as head of the new intelligence structure and Bheki Cele as the country's top police official. While Simelane is not among this latter group, he is reportedly very close to Radebe, who has strongly pushed him for the DPP position.

Comment

18. (C) Zuma's drive to appoint close personal allies to strategic posts that benefit him is hardly unusual, and his selection of Simelane was not unconstitutional. That said, we share the view of many observers that the new DPP is a poor choice for a government agency that needed a fresh start and solid management. Simelane's questionable integrity and skewed view of his office's constitutional role are obvious areas of concern. Most legal scholars and political analysts agree it will be hard for the NPA to move forward under his leadership. That said, we recall that it was only two months ago that both Zuma and Radebe won praise from the judicial

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fraternity and most South Africans for their appointments to the Constitutional Court. The strengths and weaknesses of Zuma's appointments can be debated -- as can his judgment that his cronies are best positioned to serve in certain capacities. The real test that will indicate whether the South African leader respects the Constitution, the rule of law and the principle of judicial independence will be how Zuma works with his appointees and uses the government agencies over time . The jury is still out. End Comment.
GIPS